

APPENDIX

Section 14 of the Federal Power Act, as amended, 49 Stat. 844, 16 U. S. C., Sec. 807, reads as follows:

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any,

shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Section 201 of the Federal Power Act of 1935 (49 Stat. 847, 16 U. S. C. sec. 824) provides as follows:

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy

in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

* * * *

(27)

FILED

MAR 11 1942

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 987.

FEDERAL POWER COMMISSION,
Petitioner,

v.

SAFE HARBOR WATER POWER CORPORATION,
Respondent.

**MEMORANDUM OF COUNSEL FOR PUBLIC SERVICE
COMMISSION OF MARYLAND, AMICUS CURIAE,
IN SUPPORT OF FEDERAL POWER COMMISSION'S
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE THIRD CIRCUIT.**

JOSEPH SHERBOW,
General Counsel,
Public Service Commission
of Maryland, Amicus Curiae.



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CITATION OF AUTHORITIES.

Cases:

<i>Helvering v. New York Trust Co.</i> , 292 U. S. 455	8
<i>Illinois Natural Gas Co. v. C. I. P. S. Co.</i> , No. 100, 1941 Term	7
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<i>Missouri v. Kansas Gas Co.</i> , 265 U. S. 298	6
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<i>State Commission v. Wichita Gas Co.</i> , 290 U. S. 561	7

Statutes:

Federal Power Act, 41 Stat. 1073, 49 Stat. 847, 16 U. S. C. A. 791:	
Section 20	3, 4, 6
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Counsel for the Public Service Commission of Maryland as *amicus curiae*, pursuant to Rule 27(9), asks this Court to issue a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit in this case.

JURISDICTION OF THIS COURT.

The decision of the lower court was rendered on December 2, 1941. The jurisdiction of this Court attaches by virtue of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 313(b) of the Federal Power Act.

OPINIONS.

The Opinion of the Federal Power Commission is reported in 34 P. U. R. (N. S.) 236 and the Opinion of the Circuit Court of Appeals is reported in 124 F. (2d) 800.

INTEREST OF THE PUBLIC SERVICE COMMISSION OF MARYLAND.

Two-thirds of the entire output of Safe Harbor's hydroelectric project is sold at wholesale in interstate commerce directly to the Consolidated Gas Electric Light and Power Company of Baltimore which sells electricity to consumers in Maryland. The electric rates paid by the Maryland consumers to the Baltimore Company are affected by the cost of the power that Company obtains from Safe Harbor. The decision of the Court below will frustrate effective complementary Federal and State regulation and will impair the interests of the ultimate consumers in Maryland.

QUESTIONS PRESENTED.

1. Does the Federal Power Commission have jurisdiction to regulate the interstate wholesale rates of a federally licensed hydroelectric project under the Federal Power Act?
2. Will the rate fixed by the Federal Power Commission for the licensed Safe Harbor hydroelectric project result in confiscation?

STATUTES INVOLVED.

The Federal Power Act (41 Stat. 1073, 49 Stat. 847, 16 U. S. C. A. 791) authorizes the Federal Power Commission to fix the interstate wholesale rates of all electric utilities including federally licensed hydroelectric projects under the following pertinent provisions of Section 201:

"(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation * * * of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply * * * to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy * * *.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof * * *.

(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale."

The Federal Power Act also authorizes the Federal Power Commission to prescribe the interstate wholesale rates of licensed hydroelectric projects under Section 20 which also contains the rate base provision for licensees. The Federal Power Commission elected to assert its jurisdiction in this case under Section 20. The relevant provisions of Section 20 are:

"That when said power or any part thereof (generated by a licensed hydroelectric project) shall enter

into interstate or foreign commerce the rates charged * * * by any such licensee * * * shall be reasonable, non-discriminatory, and just to the customer and all unreasonable, discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission * * * upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

"In any valuation of the property of any licensee hereunder for the purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States * * *."¹

Since the Circuit Court of Appeals placed its decision upon what we contend was an erroneous and narrow construction of Section 20, the Congressional plan for Federal rate regulation to supplement State regulation is challenged and consequently the scope and purpose of the entire Federal Power Act are involved.

¹ Section 14 provides that the United States "shall pay the net investment of the licensee in the project * * * not to exceed the fair value of the property taken * * *. Such net investment shall not include or be affected * * * by the license or by good will, going value, or prospective revenues * * *." Section 3(13) defines net investment.

STATEMENT OF THE CASE.

The Consolidated Gas Electric Light and Power Company of Baltimore furnishes electrical energy to consumers in Baltimore City and a large surrounding area. Safe Harbor Water Power Corporation operates a large hydroelectric project on the Susquehanna River in Pennsylvania under Federal Power Commission License No. 1025.

The Baltimore Company owns two-thirds of the capital stock of the Safe Harbor Water Power Corporation and the remaining one-third is owned by Pennsylvania Water and Power Company. Nearly all of the energy generated at Safe Harbor is sold to the Baltimore Company as a result of various agreements between these corporations. By contract between the parties the cost of the energy is an amount which yields to the Safe Harbor Corporation a net income of seven per cent annually on its gross investment, irrespective of the actual amount of electric energy produced.

The Federal Power Commission instituted an investigation to determine among other things whether the rates charged by Safe Harbor Water Power Corporation were unjust, unreasonable or unduly discriminatory and to determine just and reasonable rates.

On September 19, 1939, by order of the Commission I was permitted to intervene and become a party to the proceeding in my capacity then as People's Counsel to the Public Service Commission of Maryland. I participated in the hearing and filed a brief urging the Federal Power Commission to reduce the interstate wholesale rates of Safe Harbor.

The Commission, by its final order in the case, found a statutory rate base and allowed a six per cent rate of return thereon, resulting in a reduction of approximately

\$350,000 in the wholesale rate for electricity. (*Re: Safe Harbor Water Power Corporation*, 34 P. U. R. (N. S.) 236).

The Safe Harbor Corporation petitioned the United States Circuit Court of Appeals for the Third Circuit to review and to set aside the Commission's order. I filed a brief as *amicus curiae* in the Circuit Court of Appeals urging that the only agency with authority to regulate the interstate wholesale rates of Safe Harbor is the Federal Power Commission and that the rate order did not result in confiscation.

The Circuit Court of Appeals set aside the Federal Power Commission's order for want of jurisdiction under Section 20 and consequently did not determine whether confiscation will result from the rate order. The Circuit Court of Appeals interpreted Section 20 of the Federal Power Act as granting Congressional consent in advance to all compacts between the States for the regulation of the interstate transactions of federally licensed hydroelectric projects.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

This is a case of first impression involving an important question of law with respect to the jurisdiction of the Federal Power Commission over interstate wholesale rates of a federally licensed hydroelectric project under the Federal Power Act. The decision of the Court below is confusing and seems to be in conflict with decisions of this Court. It is desirable in the public interest that this Court settle this case.

The State Commissions asked Congress to occupy the field with respect to regulation of interstate wholesale rates which this Court has repeatedly held to be free from State regulation. *Missouri v. Kansas Gas Co.*, 265 U. S. 298;

Public Utilities Commission v. Attleboro Co., 273 U. S. 83; *State Commission v. Wichita Gas Co.*, 290 U. S. 561; cf. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, No. 100, decided this Term. The Federal Power Act is a comprehensive plan of federal regulation of the national aspects of this interstate commerce to supplement and make effective the regulation of retail rates to ultimate consumers by State commissions.

The Lower Court's decision, if not corrected, will produce unreasonable results. Of course, Maryland and Pennsylvania are without constitutional power to regulate interstate wholesale rates individually, so they could not act jointly. But under the decision of the Circuit Court the interstate wholesale rates of a federally licensed hydroelectric project would be subject to regulation by cumbersome interstate compacts while like rates of an unlicensed hydroelectric project or a steam plant would be subject to regulation by the Federal Power Commission under Section 201 of the Act.

Another actual case will show how the Congressional objective to obtain effective regulation would be impaired. Pennsylvania Water and Power Company buys electric energy from licensee Safe Harbor and mixes it with electric energy generated by its unlicensed hydroelectric project and steam plant in Pennsylvania and this commingled electricity is transmitted and sold at wholesale to the Baltimore Company in Maryland. It is impossible to identify the sources of generation of this interstate wholesale sale of mixed electric energy. But if it were possible to identify those sources of generation, the Circuit Court's decision would compel interstate compact regulation by Maryland and Pennsylvania of that portion generated by the Safe Harbor licensed hydroelectric project and Federal Power Commission regulation of the remainder composed of un-

licensed hydro-and-steam generated electric energy. Surely Congress did not intend such an impracticable mode of regulating interstate wholesale rates of electric utilities. Manifestly the decision of the Court below would defeat the purpose of Congress to promote effective regulation. *Helvering v. New York Trust Co.*, 292 U. S. 455, 464-465.

How could the Public Service Commission of Maryland regulate the interstate wholesale rate of the safe Harbor Water Power Corporation? It is a foreign corporation and no part of its property is in and none of its operations are conducted in the State of Maryland. If the local commission would attempt to make any examination of the books, records and accounts of the company for the purpose of determining the propriety of the operating expenses, depreciation charges, taxes, maintenance, and general expenses, all of which charges form part of the annual power bill paid to that Company by the Baltimore Company, it would be the first to allege invasion of the federal field and cite this Court's decision in the *Attleboro* case, *supra*.

It is far better, if interstate wholesale rates, which this Court described as essentially national, are to be regulated at all that "regulation should be prescribed by a single authority" like the Federal Power Commission. *Minnesota Rate Cases*, 230 U. S. 352, 399.

It is respectfully requested in the public interest that the petition for a writ of certiorari be granted in this case, that the Federal Power Commission's jurisdiction be sustained and its rate order affirmed.

JOSEPH SHERBOW,
General Counsel,
Public Service Commission
of Maryland, Amicus Curiae.

March, 1942.

AFFIDAVIT OF SERVICE.

Joseph Sherbow, being first duly sworn, deposes and says that he served counsel of record with the attached Memorandum in Support of Federal Power Commission's Petition For A Writ of Certiorari To The United States Circuit Court of Appeals For The Third Circuit, by mailing copies properly addressd to:

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Washington, D. C.

JOSEPH SHERBOW,

STATE OF MARYLAND }
CITY OF BALTIMORE, TO WIT } SS.

Subscribed and sworn to
before me this 9th day of
March, 1942.

HARRIETT BLASER,
Notary Public.